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In the Supreme Court of the United States

OCTOBER TERM, 1988

KENNETH HASTINGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment with prejudice because of a Speedy Trial Act violation.

1. On December 17, 1986, petitioner was charged in an indictment returned in the United States District Court for the District of Massachusetts with seven counts of possession of cocaine and methamphetamine, in violation of 21 U.S.C. 841(a)(1), and one count of possession of a firearm during commission of a felony, in violation of 18 U.S.C. 924(c). On March 10, 1987, the district court dismissed the indictment without prejudice based on a five-day violation of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* (Pet. App. 51a-73a).

On March 11, 1987, a second indictment was returned, charging the same eight counts as the original indictment and adding one new count. On July 22, 1987, the district court reconsidered its previous speedy trial ruling and

ordered that the first indictment should have been dismissed with prejudice under the Speedy Trial Act, 18 U.S.C. 3162(a)(2), because the prosecutor had violated a local discovery rule in the original proceedings (Pet. App. 78a-105a). The district court therefore dismissed the second indictment.

The court of appeals reversed the dismissal of the second indictment and remanded the case for trial (Pet. App. 1a-50a). The court identified the three factors that 18 U.S.C. 3162(a)(2) mandates for consideration in deciding whether a Speedy Trial Act violation should result in dismissal with or without prejudice: the gravity of the charged offenses; the circumstances leading to dismissal; and the impact of a reprosecution on the administration of the Act and on the administration of justice. The court then found that the district court's characterization of the charged crimes as "extremely serious" was unassailable; that an administrative oversight and the unavailability of the trial judge had caused the delay, not the prosecutor's violation of the discovery rule; and that neither the administration of justice nor the administration of the Speedy Trial Act furnished any basis for dismissing the first indictment with prejudice. Pet. App. 1a-46a.

On August 30, 1988, following the decision of the court of appeals, the government voluntarily dismissed the indictment in this case, on the ground that petitioner was being prosecuted by other authorities for the same conduct (Supp. Br. App. 1a-2a).

2. Petitioner contends (Pet. 17-24) that a pattern of governmental misconduct that interferes with the administration of justice should be considered in the balancing process under 18 U.S.C. 3162(a)(2) even if the misconduct does not cause delay. Petitioner also contends (Pet. 24-32) that the court of appeals improperly substituted its judg-

ment for that of the district court in finding that the district court abused its discretion in dismissing the indictment with prejudice.

Because the government has dismissed the indictment against petitioner, it is highly unlikely that the decision of the court of appeals will have any real effect on petitioner.[1] To be sure, the voluntary dismissal of charges against petitioner leaves the government free to reindict petitioner at some time in the future. But even if, for that reason, this case is not technically moot, petitioner's claim is still not ripe for review, since the court of appeals did not enter a final judgment against petitioner. The court of appeals reversed an order dismissing the indictment with prejudice and remanded the case to the district court for trial. The court of appeals' decision thus places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss and the government had dismissed the indictment at that point.

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[1] We do not agree with petitioner's contention that the decision of the court of appeals should be reviewed because it could affect petitioner in a prosecution now pending against him in state court. Petitioner argues (Supp. Br. 6-7) that the Massachusetts courts treat speedy trial dismissals as barring all future prosecutions for the same offense, and that if this Court were to grant certiorari and hold that his second federal indictment should have been dismissed on speedy trial grounds, he might be able to obtain a dismissal of the state charges against him. The infirmity in that argument, however, is that the Massachusetts rule that petitioner cites applies to dismissals of state prosecutions; petitioner cites no case nor any statutory authority suggesting that a dismissal of a federal prosecution on speedy trial grounds would bar a state prosecution for similar acts. There is therefore no support for petitioner's suggestion that a dismissal of his federal charges on speedy trial grounds would help him in his state case and that this Court should address his federal Speedy Trial Act claim for that reason.

If the government reindicts petitioner and he is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his Speedy Trial Act claim to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, the court of appeals' decision is not ripe for review by this Court.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[2] Because petitioner is not seeking review of a final judgment, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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